SUPREME COURT, U. S.
FILED
APR 21 1958
JOHN T. FEY, Clerk

In the Supreme Court

OF THE

United States

OCTOBER TERM

Nos. 122, 123, 124, 125

THE IVANHOE IRRIGATION DISTRICT, *Plaintiff and Appellant,* vs. ALL PARTIES AND PERSONS, etc., *Defendants,* THE STATE OF CALIFORNIA, *Defendant and Appellant,* COURTNEY McCRACKEN, *Defendant and Appellee.*	No. 122
THE MADERA IRRIGATION DISTRICT, *Plaintiff and Appellant,* vs. ALL PERSONS, etc., *Defendants,* THE STATE OF CALIFORNIA, *Defendant and Appellant,* CARL F. STEINER, et al., *Defendants and Appellees.*	No. 123
THE MADERA IRRIGATION DISTRICT, *Defendant and Appellant,* vs. PERLEE and JANE E. ALBASCO, *Plaintiffs and Appellees.*	No. 124
THE SANTA BARBARA COUNTY WATER AGENCY, *Plaintiff and Appellant,* vs. ALL PARTIES AND PERSONS, etc., *Defendants,* MAURICE A. BALAAM, et al., *Defendants and Appellees.*	No. 125

Appeals from the Supreme Court of California.

APPELLANTS' REPLY BRIEF.

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Appeals from the Supreme Court of California.

APPELLANTS' REPLY BRIEF.

ADDITIONAL STATUTES INVOLVED.

Two sections of the Santa Barbara County Water Agency Act, sections 6.2 and 10.1, which were not reproduced in the appendix to appellants' opening brief, are referred to in this reply brief. They are set forth in the appendix to this brief (pp. 63-65).

SUMMARY OF ARGUMENT.

The appellees have chosen to oppose our opening brief only on some of the questions involved in these cases. They have neither made argument nor cited authority against the following propositions:

1. That the appeals in these cases were timely (Appellants' Op. Br. 4-5), that they are cases or controversies within the meaning of Article III of the Constitution (Appellants' Op. Br. 5-8), and that if reviewable they are appealable (Appellants' Op. Br. 39-42).

2. That the acreage limitation in section 46 of the Omnibus Adjustment Act of 1926 applies to privately owned land (Appellants' Op. Br. 40-42, 44-45).

3. That the water delivery provisions of the contracts are authorized by and consistent with sections 9(c) and 9(e) of the Reclamation Project Act of 1939 (Appellants' Op. Br. 66-82).

4. That the contracts are not subject to attack on the theory that they reserve to the United

States the right arbitrarily to discontinue water delivery at the end of the contract term (Appellants' Op. Br. 82-85).

5. That the provision of the contracts reserving to the United States title in the project works, until otherwise provided by Congress, is valid (Appellants' Op. Br. 86-90).

Therefore, we will limit this reply brief to the points which are in issue.[1]

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[1] No separate reply is made to the amicus curiae briefs filed by the Irrigation Districts Association of California and by the American and California Farm Bureau Federations in support of the appellees. We wish to call attention, however, to the absence of documentation by which one might check the authority for key statements in the Farm Bureau brief, e.g.:

(1) "Notwithstanding that Court's [the California Supreme Court's] repeated declaration that it was concerned only with the lawful powers under California law of the appellant [Ivanhoe] District to assume the obligations of the proposed contract which is the subject of this proceeding . . ." (Farm Bur. Br. 11).

(2) ". . . until the final conversion of the improvement [the Central Valley Project] into an orthodox Reclamation Project about 1944 . . ." (Farm Bur. Br. 38).

(3) "As a matter of practical operation, the original and supplemental water supplies must be mingled for efficient distribution and the acreage limitation is applied to both supplies" (Farm Bur. Br. 38).

These statements are incorrect:

(1) The California Supreme Court made no declarations that it was concerned only with the lawful powers under California law of the Ivanhoe district to assume the obligations of the contract. Instead, as we have shown by quotations from its opinions (pp. 12-20 herein) the court was concerned primarily with the capacity of the United States.

(2) The Central Valley Project was reauthorized by Congress as a reclamation project in 1937 (Act of August 26, 1937, § 2, 50 Stat. 850, Appellants' Op. Br. 97-98).

(3) "When non-project water supplies are mingled with project water supplies in the Central Valley Project, the acreage limitation applies only to the new supply from the project. Article 32 (a) of Contract No. I75r-2485, dated Oc-

I. THIS COURT SHOULD ENTERTAIN JURISDICTION BECAUSE NONE OF THE JUDGMENTS REST ON NON-FEDERAL GROUNDS ADEQUATE TO SUPPORT THEM.

The decisions herein were based on federal grounds only: the capacity of the United States to make and carry out the contracts in issue; the constitutionality of the 160-acre limitation in section 46 of the Omnibus Adjustment Act of 1926 and the water delivery provisions of sections 9(c) and 9(e) of the Reclamation Project Act of 1939; the interpretation of these statutes and their applicability to the contracts; the interpretation of section 8 of the Reclamation Act of 1902; the interpretation of California Water Code section 23200 which authorizes California irrigation districts to distribute and apportion water acquired under a federal contract "in accordance with the applicable acts of Congress;" and the legality under federal law of the contract provisions reserving title of project works in the United States.

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tober 18, 1950, between the United States and the Tulare Irrigation District, which is located in the same county as the Ivanhoe Irrigation District, provides as follows:

"The provisions of this contract shall not be applicable to or affect water or water rights now owned or hereafter acquired by the District other than from the United States. Water furnished by the United States to the District pursuant to this contract must of necessity be transported by the District from the points of delivery established pursuant to Article 13 of this contract by means of the same works and channels as water now owned, or which may hereafter be acquired, by the District other than pursuant to the terms of this contract. Notwithstanding such mingling of water, the provisions of this contract shall be applicable to the quantity of water furnished to the District pursuant to the terms hereof, and such mingling of water shall not in any manner subject to the provisions of this contract the quantity of water acquired by or available to the District other than from the United States."

None of the "non-federal grounds" urged by the appellees is adequate to support the decisions.

The trust theory of the California Supreme Court and its application to the United States is such a departure from pre-existing state law that it must be regarded as "insubstantial" or "illusory" (*Lawrence v. State Tax Comm.*, 286 U.S. 276, 282-283 (1932)) or "plainly untenable" (*Ward v. Love County*, 253 U.S. 17, 22 (1920)). Even accepting the trust theory, it and the other asserted non-federal grounds are so interwoven with federal questions that they cannot stand alone (*Abie State Bank v. Bryan*, 282 U.S. 765, 773-777 (1931)).

The California court did not consider the authority of the state agencies to enter into the contracts apart from its consideration of the authority of the United States to offer them. The language of the opinions amply demonstrates that the court held inclusion of the 160-acre limitation in the contracts improper because it believed that, to apply the limitation without violating the constitutional rights of "excess" land owners, the United States needs, but cannot acquire, an "unlimited title" in the waters to be purveyed.

Whether the court was correct in these beliefs involves federal questions only: the effect of federal statutes on private property rights; and the power of the United States to acquire the property rights required for federal purposes. Each asserted state ground of decision relied on by the appellees is dependent on the court's resolution of these federal questions and none was decided in isolation from them.

II. FEDERAL LAW DOES NOT REQUIRE THE UNITED STATES TO VIOLATE FEDERAL LAW.

Under section 8 of the Reclamation Act of 1902, the United States must acquire the water rights it needs for reclamation projects under the system established by state law and may not rely on water rights alleged to arise from its ownership of the public domain (*Nebraska v. Wyoming*, 325 U.S. 589, 611-615 (1945)). If rights so acquired are insufficient, section 8 requires the United States to pay for state-recognized privately owned rights which it takes under the power of eminent domain (*United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 739 (1950)). But section 8 neither compels the United States to use federal facilities to deliver water in a manner contrary to federal law (*Nebraska v. Wyoming*, 325 U.S. 589, 615 (1945)), nor prohibits the United States from acquiring, with payment of compensation, the rights it needs to operate a project in accordance with federal law (*United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 740-741 (1950)). This interpretation accords with the common-sense canons of statutory construction and with the legislative history of the Reclamation Act. A contrary interpretation would subject federal reclamation law to repeal by state action.

III. CONGRESS HAS CONSTITUTIONAL POWER TO REQUIRE THE ACREAGE LIMITATION UNDER THE GENERAL WELFARE CLAUSE.

Application of the acreage limitation in California does not raise any constitutional issue of the "over-

riding" of state law by federal law. The public agencies involved in these cases have authority under California law to agree to the acreage limitation if the United States can require it (Calif. Water Code §§ 23197(a), 23200). The United States can require it without interfering with the constitutional rights of "excess" land owners, because the limitation is a restriction on the use of federal facilities and not on any inchoate water rights which such owners may own in undeveloped water. But if these inchoate rights are truly private property within the meaning of the Fifth Amendment and are needed by the United States in order to operate the projects in compliance with federal law, it may acquire them under its power of eminent domain. Such acquisition of property does not "override" state law (*United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 739 (1950)).

Moreover, the general welfare power is a separate and distinct federal power limited only by the requirement that it shall be exercised for the common good as distinguished from some mere local purpose. It enjoys the benefit of the supremacy clause equally with any other federal power. Thus, if state law is "overridden" when the United States, under the power of eminent domain, acquires property needed for a federal activity undertaken pursuant to the general welfare clause, there is no invasion of the constitutional prerogatives of the state.

Development of the state's water resources to meet its growing needs requires substantial federal assistance. This can be forthcoming only if the power

and mechanics of federal-state cooperative activity are preserved against fanciful constitutional objections such as are here made by the appellees against the general welfare clause. Sustaining the federal authority will still leave the state free to reject federal aid and undertake the job alone should it ever so desire. But a contrary ruling could destroy the only means of accomplishing large-scale water development which has heretofore been effective.

IV. THE ACREAGE LIMITATION DOES NOT TAKE PROPERTY WITHOUT DUE PROCESS OR DENY EQUAL PROTECTION.

The acreage limitation is a restriction on the furnishing of water or service through subsidized reclamation projects built with money belonging to all the people of the United States. It does not affect privately owned rights to receive water through other means. Its purpose is to distribute the benefits of reclamation development widely and equitably. Rather than taking property from anyone, it makes new property available for use, and does so in a manner which secures equal protection of the laws to all concerned.

In raising the question of assessments without benefits (Appellees' Br. 80-91), the appellees have introduced objections not relied on by the California court. The question whether the Board of Directors of the Madera district correctly held that under the acreage limitation the "excess" land owned by the appellees in the Albonico case receives a benefit from the Madera district, thus justifying retention of the property in

the district and the payment of *ad valorem* assessments, was an issue in the California Supreme Court but was not decided by that court.

In the Santa Barbara decision, however, the California court held that receipt of water is not a prerequisite to keeping land in a district; indirect benefits alone may warrant collection of *ad valorem* assessments (47 Cal.2d 712, 306 P.2d 883, AJS 220). Also, direct benefits may accrue to land not delivered a surface water supply because of the raising of the underground water table that results from surface deliveries to other land. If benefits are not commensurate with *ad valorem* assessments, California law provides for special rates of assessments (Calif. Water Code §§ 25825, 23242) and authorizes recovery of assessments paid with no benefit (*Chapman v. Los Angeles*, 26 Cal.App.2d 186, 79 P.2d 128 (1938)).

ARGUMENT.

I. THIS COURT SHOULD ENTERTAIN JURISDICTION BECAUSE NONE OF THE JUDGMENTS REST ON NON-FEDERAL GROUNDS ADEQUATE TO SUPPORT THEM.

The appellees' argument against jurisdiction ignores the principle stated as long ago as *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 357 (1816), that in the review of decisions of state courts this court reviews the case which was decided, not the case which might have been decided. They seek the shelter of the rule that this court will not consider the judgment of a state court which rests "in part on a non-federal

ground adequate to support it" (*Flournoy v. Wiener*, 321 U.S. 253, 262 (1944)).

But the very statement of the rule shows the care and qualifications with which it must be applied. (1) The ground must be non-federal. (2) If non-federal it must support the judgment, i.e., the rule has no application "where, as here, the non-federal ground might have been considered by the state court but was not" (*Grayson v. Harris*, 267 U.S. 352, 358 (1925)). (3) If non-federal and used to support the judgment it must be adequate. A non-federal ground is not adequate: (a) if it is interwoven with a federal ground (*Abie State Bank v. Bryan*, 282 U.S. 765, 773-777 (1931)); or (b) if it is "insubstantial" or "illusory" (*Lawrence v. State Tax Comm.*, 286 U.S. 276, 282-283 (1932)), or "plainly untenable" (*Ward v. Love County*, 253 U.S. 17, 22 (1920)), or a "palpable evasion" to avoid a federal rule (*West Virginia v. Sims*, 341 U.S. 22, 33 (1951) (concurring opinion)). We submit that each of the qualifications shows that the rule has no application in the present cases, and, therefore, this court should take jurisdiction.

Whatever involves the power, rights and duties of the United States is a federal question. This includes the interpretation of state statutes affecting the United States (*Wilson v. Cook*, 327 U.S. 474, 486 (1946)) and the interpretation of federal contracts. (*S.R.A. Inc. v. Minnesota*, 327 U.S. 558, 564 (1946)). The appellees contend that the interpretation of federal contracts "is governed by general contract law" (Appellees' Br. 53). Nevertheless, whether and to what ex-

tent non-federal law is applied to the United States remains a federal question (*Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943)).

The appellees meet the axiomatic proposition that what concerns the United States is a federal question by contending that what is involved is the contractual capacity of the districts as distinguished from the capacity of the United States.[2] It is submitted that this is in error because it is refuted both by the logic of the decisions and by the language of the California court.

The chief burden of the appellees' argument is:

> "The contracts are invalid, not because the court below held the United States lacked capacity, but because it held that the state agencies lacked the capacity" (Appellees' Br. 74).

They apparently seek to show the correctness of the argument by constant reiteration (e.g. Appellees' Br. 7, 22, 24, 43, 46 etc.). Certainly they do not show it by reference to the language of the opinions below, and for good reason. The opinions demonstrate the exact opposite of the appellees' proposition.

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[2]To us it seems abundantly clear that state laws give state districts capacity to enter these contracts if the United States can acquire the necessary water rights. Therefore, we do not pause to consider whether federal law has itself endowed the districts with whatever necessary capacity they otherwise might lack (cf. *Antle v. Tuchbreiter*, 414 Ill. 571, 111 N.E. 2d 836 (1953), commented on in *Validity of Federal-State Contract which Violates State Constitution*, 54 Colum. L. Rev. 289 (1954)).

A. The California court held the districts had capacity to contract with the United States. This eliminates the state ground relied on.

The California court said and held that the districts had capacity to enter into these contracts:

> *"In entering into the contract the parties are dealing within statutory authorization*[3] but at arm's length" (47 Cal.2d 629, 306 P.2d 843, AJS 36).

> "As stated it is certainly true that it was within the power of the district under the laws of this state to do in the first instance all that the United States is obligating itself to do under the contract with reference to the construction of a distributing system. The district was authorized to obtain funds for that purpose by borrowing from the United States with or without the issuance of irrigation district bonds (Wat. Code, §§ 23280-23289) and it could contract for the payment for water distributed to it by or through an outside source at a fixed point of delivery upon the payment of the charges agreed upon from funds of its own, if available. (Wat. Code, § 22228.) In essence, therefore, we have here one party agreeing to provide the funds for construction work and undertaking to furnish water at a definite delivery point, and the other party agreeing to accept the water at that point with payment therefor at a fixed rate and repayment of the construction charges in installments within 40 years, coupled with what appears to be all sufficient assurances of security in the event of non-payment. *Within the compass of those provisions there can be no doubt of the right and power of the parties*

[3]Unless otherwise noted, emphasis in this brief is added.

to lawfully contract" (47 Cal.2d 630, 306 P.2d 843, AJS 37-38).

The California court's language contradicts the idea that the districts lack capacity to enter the contracts. What renders the contracts void, in the view of the California court, is the lack of capacity of the United States to require some of the conditions it demands of the districts. There is nothing in its opinions to indicate that the districts cannot meet these demands if the United States may require them.

B. The California court held, and acted on its holding, that the contracts are bad because the United States needs, but cannot acquire, an "unlimited title" to the water to be purveyed in order to apply the acreage limitation.

The expression "unlimited title" is, the appellees say, that of the appellants (Appellees' Br. 61). If they thereby mean to imply that we have distorted the reasoning of the California court, they are wrong. The expression is that of the court and we used it, and we believe correctly, because the court used it:

> "As previously noted the 160-acre limitation is inapplicable in the present case where the title to the water to be purveyed is not an *unlimited title* in the United States" (47 Cal. 2d 639, 306 P.2d 849, AJS 51).

That the court was not using the expression casually or unguardedly appears from its several statements of like import referring to what it believed the United States claims or requires, e.g., "title to the water without restriction" (47 Cal.2d 620, 306 P.2d 837, AJS

22), and "absolute ownership" (47 Cal.2d 620, 306 P.2d 837, AJS 23).

Further, it held the United States is subject to "the limitations of title herein determined" (47 Cal.2d 628, 306 P.2d 842, AJS 35). This follows its postulate that:

> "The questions raised in this case cannot be answered without reference to the nature and character of the title to the water rights involved" (47 Cal.2d 613, 306 P.2d 833, AJS 12).

The court described the various methods by which the United States has acquired water rights for the Central Valley Project (47 Cal.2d 618-619, 306 P.2d 836-837, AJS 19-21), e.g. by purchase, assignment and applications filed in its own name. The court, however, neglected the rights acquired by eminent domain (*United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 739 (1950).[4] The court then reached the following conclusion:

> " . . . title . . . is of great importance because upon it depends the extent to which the state or the *United States* or any party dealing with the domestic waters of the state *may exercise powers of control*" (47 Cal.2d 619, 306 P.2d 837, AJS 21-22).

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[4]The Cachuma project involves only heretofore unappropriated water (47 Cal.2d 706, 306 P.2d 879, AJS 210). On February 28, 1958, the State Water Rights Board granted permits to the United States. Under these permits the rights of the public agencies concerned are "subject to compliance by the public agencies concerned with any and all present and future valid contractual obligations with the United States . . ." (Calif. State Water Rts. Bd. Dec. No. D886, Order par. 16).

The court held that the "trust" with which it has encumbered all the waters in the state affects all the rights of the United States from whatsover source acquired:

> "*Whatever interest or title the United States has acquired to water by appropriation, assignment or by other means of acquisition* in furtherance of the execution of its trust relationship with the water users of the state is necessarily subject to the limitations of title herein determined" (47 Cal.2d 628, 306 P.2d 842, AJS 35).
>
> "Moreover, as we have already held, *whatever title the United States has to the domestic waters of this state is limited* by the trusteeship under which that title was acquired. The United States cannot administer the corpus of that trust except in the manner defined by the terms of the trust, namely, the applicable water law of this state." (47 Cal.2d 642, 306 P.2d 851; AJS 56).

These holdings of the California court, that the water users of the state have inchoate rights incapable of acquisition by the United States and that therefore any title to water rights acquired by the United States is correspondingly limited, were the predicate of the court's conclusion that the acreage limitation in the contracts is unconstitutional:

> "As to the acreage limitation of the contract, it is therefore concluded that the extent of the right of an owner of real property to the use and enjoyment of his property right, including the water right which may be attached thereto, cannot be constitutionally limited on the sole basis of the amount of property he owns. . . . There

appears to be no basis founded on reason or authority why the owner of a property right which is or may be appurtenant to all of his land suitable for irrigation can be limited in the enjoyment of that right to 160 acres of his larger holdings. The same right should attach to his lands in excess of 160 acres and to the excess lands of all those similarly situated. . . .

"Notwithstanding the long prevailing provisions of the original Reclamation Act of 1902 that in the construction and operation of the reclamation projects under the supervision of the Secretary of the Interior, rights vested under state law should not be disturbed and should be protected, the contract in controversy is proposing to transgress those vested rights" (*Ivanhoe* case, 47 Cal.2d 637-638, 306 P.2d 848, AJS 48-49).

"For reasons stated in the *Ivanhoe* case the contract in the present case is ineffective in that it purports to deprive the landowners of the plaintiff district of vested rights as members of the class who are the beneficiaries of the trust under which the United States acquired appropriative rights to the domestic waters of this state; in that it seeks to deprive so-called 'large landowners' of rights to water for their lands in excess of 160 acres although such landowners are qualified members of the class who are the beneficiaries under the declared trust, and who are denied thereby due process and equal protection of the laws; . . . (*Madera* case, 47 Cal.2d 687-688, 306 P.2d 890, AJS 145).

"In the fifth affirmative defense the defendants raise issues which have been discussed and disposed of in *Ivanhoe* . . . and in *Madera*. . . . In

accordance therewith it is concluded that the excess land provisions of the contracts involved here, which are substantially the same as those in the Ivanhoe and Madera contracts, are inapplicable and if not declared to be so would deprive the landowners of the members units of their property rights without due process of law and constitute a denial of the equal protection of the laws" (*Santa Barbara* case, 47 Cal.2d 713, 306 P.2d 884, AJS 221).

These excerpts from the opinions of the California court demonstrate that it invalidated the acreage limitation because it believed (1) that the limitation cannot be constitutionally applied by the United States unless the United States has an "unlimited title" in the water, and (2) that the United States lacks the ability to acquire an "unlimited title." Both beliefs raise federal questions:

1. Does the limitation, which is required by federal law, deprive owners of excess land of inchoate rights which they may possess in the undeveloped waters of the state and thereby deny them equal protection of the laws, in which event the United States would need title not limited by such inchoate rights in order to apply the limitation? Or, on the contrary, is the limitation merely a restriction on the use of federal facilities and not on water rights, as we have contended in our opening brief (Appellants' Op. Br. 61-63)?
2. If the United States does need an "unlimited title" in order constitutionally to apply the limitation, does it have the power to acquire such a title?

If either question were answered differently than the California court answered it, the conclusion as to invalidity of the acreage limitation provisions in the contracts would necessarily be different also.

C. If the United States can acquire the title needed for project purposes the same judgment would necessarily not be rendered below for title would then be irrelevant and the California court so states.

"*If the United States,* or the State of California or any of its agencies, *should be declared to be the owner of the title to the water without restriction it would necessarily follow that it would have complete dominion and control over such property for purposes of distribution or for any other incident of ownership and use.* In such case the principles of law applying to unrestricted ownership would control. On the other hand, if the United States or the State of California or its agencies, in dealing with the storage, sale, distribution and use of such water, is acting as trustee for the beneficiaries of the trust, other principles of law, namely the law of trusts, would necessarily apply. *The exclusion of the question of title from the case could be justified only on the theory that without question, and as a matter of law, the fee simple unrestricted title to the water is in the state or in its assignee, the United States, or in the United States other than by assignment unaffected by the claims of the land owners in the District as the beneficiaries of a trust.* Such a theory finds no support in the present case" 47 Cal.2d 620, 306 P.2d 837; AJS 22).

"As indicated the federal law could be applicable only on the theory that the United States is the

owner absolute of the domestic waters of the state with the right to the use thereof freed from any trust relationship on behalf of the real owners thereof, namely, the water users of the district. As also indicated such a theory is untenable and it necessarily follows that the inclusion in the contract of articles 34, 35, 36 and 37 cannot be legally justified'' (47 Cal.2d 639, 306 P.2d 849, AJS 51).

Thus, the California court has itself declared that should the conclusion as to the United States' rights be changed, the conclusion of the case would necessarily be changed. (It is impossible to say that the actual result would be changed, for, as the appellees point out, a state question concerning the notice of election has been left open (Appellees' Br. 32). Leaving such a question open, however, cannot defeat federal review (*Grayson v. Harris*, 267 U.S. 352, 358 (1925)).

D. The non-federal grounds on which the appellees rely are dependent on and interwoven with the federal grounds and so are inadequate to support the judgments.

The appellees rely on what they claim are non-federal grounds adequate to support the judgments. These are the references to California Water Code section 22250; the nature of an irrigation district as a trustee under state law; the California court's treatment of the Second Validating Act of 1949 (Calif. Stats. 1949, c. 782, p. 1511); the "debtor-creditor" relationship between the districts and the United States; and the effect of California Constitution Article I, sections 11 and 13, and Article XIV, section 3.

The California court says, however:

> "If the United States, . . . should be declared to be the owner of the title to the water without restriction, it would necessarily follow that it would have complete dominion and control over such property for purposes of distribution or for any other incident of ownership and use. In such case the principles of law applying to unrestricted ownership would control" (47 Cal.2d 620, 306 P.2d 837, AJS 22).

Inspection of the holdings with regard to each of the appellees' points shows that they are so interwoven with the federal question of the nature of the United States ownership that they cannot in themselves support the opinion.

1. California Water Code section 22250 is applicable only if the United States needs, but cannot acquire, an unlimited title.

The appellees refer to the California court's statement concerning California Water Code section 22250 (Appellees' Br. 33):

> "The duty of both of the contracting parties in the performance of their obligations to the landowners in the district is set forth in section 22250 of the Water Code" (47 Cal.2d 636, 306 P.2d 847, AJS 46).

In its very statement this is an obvious example of interweaving of federal and state questions. It in no way indicates the surprising conclusion that if a different result were reached as to the duty of the United States, the duty of the district would remain unaltered (cf. Appellants' Op. Br. 34, 65). The appellees say

that even if the United States were the absolute owner in fee of the waters within the Central Valley Project and could condition or limit their use as it sees fit, still the judgments of the court below would stand and the contracts would of necessity be declared invalid (Mo. to Dis. 22). But the California court reasoned that if the United States could secure an unlimited title then California Water Code section 23200 would apply:

> "Section 23200 contemplates that *applicable* federal law shall apply. As previously noted the 160-acre limitation is inapplicable in the present case where the title to the water to be purveyed is not an unlimited title in the United States" (47 Cal.2d 639, 306 P.2d 849, AJS 51 (emphasis in original)).

2. If the United States has or can acquire the title needed to apply the acreage limitation, the trust status of a California irrigation district is immaterial.

The appellees refer to the nature of an irrigation district as a trustee under state law (Appellees' Br. 31, citing 47 Cal.2d 624-625, 306 P.2d 840, AJS 29). The trust arises from California Water Code section 22437:

> "The title to all property acquired by a district is held in trust for its uses and purposes. The district may hold, use, acquire, manage, sell or lease the property *as provided in this division.*"

Twenty years ago the California court said:

> "Indeed, it is futile to attempt to discover the 'beneficiaries' of the statutory trust created by section 29 [now § 22437]" (*Clough v. Compton-*

Delevan Irr. Dist., 12 Cal.2d 385, 389, 85 P.2d 126, 128 (1938)).

But even though the court impliedly found the futility no longer troublesome, its reference to the trust does not establish the proposition that the case was decided on state grounds. A reading of section 22437 shows that it recognizes whatever powers the district has under the Irrigation District Federal Cooperation Law (Calif. Water Code §§ 23175 *et seq.*), which is part of the division of the code referred to in section 22437. The "enlarged powers" (Calif. Water Code § 23179) of irrigation districts under the Cooperation Law to distribute and apportion water acquired under a federal contract "in accordance with the *applicable* acts of Congress . . . and the provisions of the contract" (Calif. Water Code § 23200) were eliminated by the California court because it believed that section 46 of the Omnibus Adjustment Act of 1926, the act of Congress requiring the acreage limitation, is not "applicable." This belief, as we have already shown by quotations from the California court's opinion (pp. 18-20 herein), is based on the court's erroneous theory that the United States does not have, and lacks the authority to acquire, the sort of title in water necessary to make section 46 applicable. It is obvious, therefore, that the real grounds of decision were federal.

The fact that the federal law is not discussed by the California court until after the trust nature of the irrigation district is discussed (Appellees' Br. 36) is,

of course, irrelevant. What is important is the content of the discussion, not its order. In the whole context (47 Cal.2d 624-629, 306 P.2d 840-842, AJS 29-35) it is clear that the United States is being assigned the status of a trustee somehow analogous to that of an irrigation district under state law. The "enlarged powers" of the district (Calif. Water Code § 23179) are being subordinated to the United States' status as trustee and, since the property in the hands of the United States is encumbered, it will also be encumbered in the hands of the district. The clear implication of the opinion is that the federal requirements would be applicable and that the district could deliver water in accordance with those requirements if the trust relationship of the United States to the landowner were absent (47 Cal.2d 620, 639, 306 P.2d 837, 849, AJS 22, 51).

3. The California court's reference to the Second Validating Act of 1949 does not demonstrate reliance on state grounds.

The appellees argue that because the California court held the Second Validating Act of 1949 (Calif. Stats. 1949, c. 782, p. 1511) ineffective to cure what it considered constitutional defects in the Ivanhoe contract, this proves that the contracts must be invalid on a state ground (Appellees' Br. 23, 43). This is in error because inspection of the opinion shows that the constitutional defects with which the court was concerned were the conduct of the United States as a utility and federal law as referred to by state law.

The California court first held the act inapplicable as a matter of interpretation (47 Cal.2d 643-644, 306

P.2d 851-852, AJS 56-58). This holding is an interesting sidelight on the length to which the court went to strike down these contracts, for it is obviously wrong.

The court then held that the act did not and could not relate to public utilities (47 Cal.2d 644-645, 306 P.2d 852-853, AJS 59). Since the only "utility" involved here is the United States (47 Cal.2d 642, 306 P.2d 851, AJS 55), it is obvious that the reference to utilities has to do with the United States, whose rights, even under state law, are federal questions.

Finally, the court stated:

> "In addition any validating act could not have confirmed the 160-acre limitation for the obvious reason that the Legislature could not have theretofore constitutionally authorized it" (47 Cal. 2d 645, 306 P.2d 853, AJS 59).

This amounts to no more than a reiteration of what the California court has already held (47 Cal.2d 636-639, 306 P.2d 847-849, AJS 47-51), that a federal law,

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[5]The Validating Act of 1949, Calif. Stats. 1949, c. 781, p. 1508, is identical with the Second Validating Act except that the former has an "urgency clause", which made it immediately operative, thereby precluding a referendum (Calif. Const., Art. IV, § 1, par. 4). The acts were adopted on the same day in immediate succession. The first act validated transactions of public agencies prior to the act's operative date. Since the interpretation given to the second act by the court allows it to cover only the very same transactions as those already covered by the first act, on which a referendum was precluded, the reference to a referendum in the opinion is mystical rather than intelligible (47 Cal.2d 644, 306 P.2d 852, AJS 58). The California court has heretofore approved prospective validating acts without blinking (*In re East Bay etc. Water Bonds of 1925*, 196 Cal. 725, 735-736, 239 P. 38, 42-43 (1925); *Wilcox v. Engebretsen*, 160 Cal. 288, 293, 116 Pac. 750, 751-752 (1911)).

section 46 of the Omnibus Adjustment Act of 1926, is unconstitutional and therefore inapplicable under California Water Code section 23200. Obviously, the quoted statement is another one which would have to be changed if it were held that the United States either did not need an "unlimited title" in order to apply the limitation or, if it did need an "unlimited title," had the power to secure it.

The acreage limitation was held unconstitutional because the court felt it deprives property owners of property without due process, and restricts the use of property on the basis of the amount owned (47 Cal.2d 636, 637, 306 P.2d 847, 848, AJS 48, 49). The property in question is the "inchoate right of present and potential water users" to an adequate supply of fresh water (47 Cal.2d 626, 306 P.2d 841, AJS 32). The court's statement as to the validating act was thus predicated on the assumption that the United States cannot acquire what the court felt to be the necessary unlimited title. This is another example of the fact that the opinion turns on a federal issue, the California court's belief that:

> "... title . . . is of great importance because upon it depends the extent to which . . . the United States . . . may exercise powers of control" (47 Cal.2d 619, 306 P.2d 837, AJS 21-22).

4. The debtor-creditor relationship is based on federal law.

The appellees argue that in declaring the "debtor-creditor" relationship between the districts and the United States, "of necessity" the California court was looking at state rather than federal law (Appellees'

Br. 39). This proposition is flatly contradicted even by the portions of the opinion relied on by the appellees.

The debtor-creditor relationship is first mentioned immediately after the court's statement that the parties "are dealing within statutory authorization" (47 Cal.2d 629, 306 P.2d 843, AJS 36-37). Later the court said:

> "We have heretofore declared the debtor-creditor nature of the contract in question. In arriving at that conclusion it was considered that *applicable federal law* requires that the contract specify a specific amount of money to be repaid by the district in installments within 40 years . . ." (47 Cal.2d 640, 306 P.2d 849, AJS 52).

This was followed by an interpretation of sections 9(d) and 9(e) of the Reclamation Project Act of 1939. We have already argued at length the error of this interpretation (Appellants' Op. Br. 71-85). The point we make here is that whether the court's answers were right or wrong, the questions are federal: interpretation of a federal statute; the obligation of the United States with regard to federal property; and the corresponding federal rights of the districts (47 Cal.2d 631, 306 P.2d 844, AJS 39-40).

5. The testing of a federal statute by a state constitution presents a federal question.

The appellees argue that the California court held the contracts to be beyond the powers of the districts and the Santa Barbara Agency on the basis that they are violative of California Constitution Article I, sec-

tions 11 and 13, and Article XIV, section 3, even if they are authorized by statute; and that this is an independent state ground of decision (Appellees' Br. 40-42, 44-45).

Article I, section 11, which requires the uniform application of general laws, was never cited by the California court. The appellees suggest (Appellees' Br. 42) that it was in the court's mind when it discussed the unconstitutionality of the 160-acre limitation as a denial of equal protection of the laws (47 Cal.2d 636-637, 306 P.2d 847-848, AJS 47-49.) But since the California Constitution does not have an equal protection clause by that name, it seems more likely that the California court was referring to the federal constitution where such a clause does appear.

Article XIV, section 3, limits water rights in California to "such water as shall be reasonably required for the beneficial use to be served" and was cited by the California court solely in its discussion of the history of riparian rights in this state (47 Cal.2d 622-623, 306 P.2d 838-839, AJS 26-27).

Under these circumstances, we submit that the California Constitution provisions constituted no basis of decision. But if they did, they were used as a test of the powers of the United States and the validity of federal statutes. The constitutional authority of the districts and the Santa Barbara Agency to accept the federal terms was never considered independently of the federal question of the power of the United States to offer them. Since the question under consideration was the validity of federal statutes and federal pow-

ers, whether the federal or state constitution was referred to is immaterial. (*Ex parte Worcester Nat. Bank*, 279 U.S. 347, 359, 360 (1929)).

E. Interpretation of California Water Code Section 23200 presents a federal question and no substantial non-federal question.

The appellees advert to the California court's discussion of California Water Code section 23200 and claim it presents a non-federal question of interpretation, i.e. has the state law incorporated the federal law (Appellees' Br. 39). The section provides:

> "All water, the right to the use of which is acquired by a district under any contract with the United States shall be distributed and apportioned by the district in accordance with the *applicable* acts of Congress, the rules and regulations of the Secretary of the Interior thereunder, and the provisions of the contract. . . ."

The word *applicable* in the above section is emphasized by both the appellees (Appellees' Br. 37, 38, 39) and the California court (47 Cal.2d 639, 306 P.2d 849, AJS 50-51). Of course, the word is a redundancy and adds nothing to the meaning of the section. Certainly if it were eliminated, inapplicable acts of Congress would not thereby become applicable. (To like effect note the reference to "the relevant acts of Congress" in Calif. Water Code § 23197(a)).

The Irrigation District Federal Cooperation Law admits of but one rational interpretation; it refers to the acreage limitation. This is supported not only by its own obvious language in section 23200 and other

sections of the law (e.g. §§ 23195, 23197(a), Appellants' Op. Br. 110), but also by its history.

The California law and similar ones in other states were enacted as part of a program of the former Reclamation Service to facilitate cooperation between districts and the United States (*McLean v. Truckee-Carson Irr. Dist.*, 49 Nev. 278, 290, 245 Pac. 285, 288 (1926)). Indeed it was recommended to the California Legislature because, "It is desired to render easier cooperation with federal authorities under the national Reclamation Act" (California Legislature, Report of State Water Problems Conference (1916), Appendix to Journals 1917, vol. 6, p. 61).

In 1953 a bill was introduced in the California Legislature which would have specifically denied to districts authority to conform to federal requirements Instead it provided: "All water acquired by a district under any contract with the United States shall be distributed and apportioned by the district *in accordance with applicable state laws.*" (Assembly Bill 863, 1953 Sess. as amended June 6, 1953, p. 16, Water Code § 20208). A few days before the session ended, the Governor sent the following message to the authors of the bill:

> "Because I recommended legislation creating a department of water resources in my Message to the Legislature last January, I feel I should advise you that I would not be able to sign your Assembly Bill No. 863 if it should come to my desk in its present form. There are several reasons, but principally, (1) *the incorporation therein of substantive changes in the Water Code*

limiting irrigation districts in their right to contract with the United States Government, which limitations would prevent the execution of contracts essential in our federal reclamation projects. (2) The drastic limitations placed on the District Securities Commission in approving contracts between districts and the Federal Government. (3) The establishment of a state water attorney selected through civil service who shall be 'independently responsible for the exercise of the jurisdiction, powers and duties of the legal division.'

"These features of the bill in particular differ from my concept of a department of water resources that can effectively guide our State in the development of its water resources. I write you at this time because obviously it would be impossible for me to return the bill to the Legislature before adjournment with my reasons for disapproval" (Assembly Journal, June 10, 1953, p. 3, pp. 5666-5667).

The bill died.

Against this background to argue that section 46 of the Omnibus Adjustment Act of 1926 was found inapplicable as a matter of interpretation of state law is to argue that communication even by plain language is impossible.

The mode whereby the California court construed the federal law and found it invalid and hence inapplicable (47 Cal.2d 636-639, 306 P.2d 817-849, AJS 47-51) has already been explained (pp. 20-21, 24-25 herein). The appellees' reliance on the rule in *Lynch v. New*

York, 293 U.S. 52 (1934), is misplaced because it and like cases dealt with state statutes. Here what was invalidated was the federal statute referred to by the state statute and the fact that the federal statute may have been invalidated on the basis of the state constitution supports, not negates, jurisdiction (*Ex parte Worcester Nat. Bank*, 279 U.S. 347, 359, 360 (1929)).

Similarly, the reliance of appellees on *Miller's Executors v. Swann*, 150 U.S. 132 (1893), is wrong. Two situations must be distinguished. One is where a state law refers to a federal law and adopts it in a field of no federal concern. For example, a state may adopt the Federal Rules of Civil Procedure. This obviously would not make every question of state practice a federal question because, regardless of the reference, the problem would still be one of exclusive state concern.

But where, as here, a state attempts to interrelate the conduct of its agencies with those of the United States in a like field, a situation where the state and federal laws are interwoven to meet a common purpose, the result is different (Appellants' Op. Br. 38-39).

The difference is concisely and lucidly expounded as follows:

> "State law, of course, is not transformed into federal merely by phrasing it in federal language. The identical language may receive differing interpretations at the hands of state and federal courts. So far as the Federal Constitution is concerned, there is nothing to prevent a state legislature from dealing with this difficulty by direct-

ing the state courts to conform as nearly as may be with federal interpretations. But can the legislature, or the state court by construction of the state statute, go further and, in effect, make the interpretation of the federal language, even when employed for state purposes, a federal question subject directly to authoritative resolution by the Supreme Court?

"Despite contrary intimations in a few recent Supreme Court decisions, time and mature reflection seem likely to yield the answer that they cannot. *The situation must be sharply distinguished from that in which state law refers to federal, interrelating its own law with it but without seeking to enlarge the sphere of primary federal governance.* Thus a state may give a stockholder in a state-created corporation a right of action to prevent the directors from investing in illegally issued securities, and a question may arise whether federal securities were or were not legally issued. Again, a state may confer a private right of action for breach of a federally imposed duty, and a question may arise whether the federal duty has indeed been violated. In such cases as these the Supreme Court will treat the point of federal law as presenting a genuinely federal questions, reviewable on certiorari or appeal from a state court's decision. But it is a different matter to permit the legislature of a single state to alter the distribution of federal and state powers by making federal law directly controlling in a sphere of exclusive state responsibility. Plainly the state could not unilaterally appropriate the services of federal administrative agencies in this fashion. There seems to be no better reason why

they should be able thus to appropriate the services of the federal courts" (Hart, *The Relation Between State and Federal Law*, 54 Colum. L. Rev. 489, 536-538 (1954) notes omitted).

F. The Santa Barbara Case shows that federal grounds were relied on to the exclusion of state grounds.

The appellees state correctly (Appellees' Br. 44) that we argue that since the four cases were decided on a common basis, and since there is no common state basis between *Santa Barbara* and the other three, it follows that the cases were decided on federal grounds alone (Appellants' Op. Br., 27, 29-31). They do not dispute the logic of our conclusion. Rather they attempt to refute the premise that there is no common state ground. An examination of their argument shows why it should fail.

The appellees first attempt to ignore or neglect the difference. Thus, in their motion to dismiss (p. 2) they simply label the Santa Barbara Agency and its member units irrigation districts. Then this is aggravated by implying that the powers of the Agency to contract with the United States are the same as those of an irrigation district (Motion to Dismiss 11; Appellees' Br. 9). Neither the label nor the implication is warranted by the facts.

Inspection of section 6 of the Santa Barbara Act (Appellants' Op. Br. 113) will show that the Agency has full and independent powers to cooperate with the United States. "In addition to the powers specifically set forth in this act," it has the powers of an irrigation district under the Irrigation District Fed-

eral Cooperation Law to the extent "not inconsistent with the provisions of this [Santa Barbara County Water Agency] act." Thus even if the appellees were correct in asserting that the result in the *Ivanhoe* and *Madera* cases depends merely on interpretation of California Water Code section 23200, a part of the Cooperation Law (Appellees' Br. 39), this could not control the *Santa Barbara* case because the Santa Barbara Agency is not limited by section 23200.

Similarly, neither the Agency nor its member units are controlled by other portions of the Irrigation District Law. Not only is there no counterpart, in the statutes which govern the Agency and its member units, of California Water Code section 22250 concerning apportionment of water ratably to assessments, but their statutes contain requirements irreconcilable with that scheme of apportionment. The agencies are specifically directed to finance their operations by revenues from water rates so far as possible and only if these are inadequate to levy property taxes (Santa Barbara County Water Agency Act §§ 6.2, 10.1; California Water Code §§ 31158, 31701).

Appellees' mode of handling the inapplicability of section 22250 is to say that the inapplicable is applicable. Although they concede that the section "does not in terms apply", it is said to represent a state policy of general application embodied in California Constitution Article XIV, section 3 (Appellees' Br. 44). This argument is borne out neither by the words of the Constitutional provision nor by what the California court itself said about the provision and about

section 22250. The provision states that the "general welfare requires that the water resources of the state be put to [maximum] beneficial use" and that water rights are "limited to such water as shall be reasonably required for the beneficial use to be served." "The amendment was designed primarily to destroy the right to object to the use of water not presently needed . . ." (*Los Angeles v. Glendale,* 23 Cal.2d 68, 75, 142 P.2d 289, 293 (1943)). The amendment, as this court has pointed out, deprived a riparian of his former right to an injunction to have the natural flow of the stream continue past his land even if he was getting no substantial benefit from it, and remitted him to his remedy by way of damages (*United States v. Gerlach Live. Stock Co.,* 339 U.S. 725, 751, 754 (1950); Wiel, *Fifty Years of Water Law,* 50 Harv. L. Rev. 252, 286-289 (1936)). In this case the California court said no more (47 Cal.2d 622-623, 306 P.2d 838-839, AJS 25-27).

Nowhere have we found anything to indicate that the amendment has been used to require the delivery of water to any particular land. Actually, it may indicate the possible invalidity of California Water Code section 22250 insofar as the section purports to apportion water to land which cannot use it beneficially. In a case decided before the amendment, the California court held that an irrigation district could proceed by way of both water tolls and assessments. It noted the obvious lack of relationship between assessed value of land and its need for water, and that under the "strictly assessment plan" the lands which

need water least might be entitled to most. It said: "Such a situation is contrary to every principle of the law governing the use of water from the time when water was first applied for irrigation purposes in this state" (*Willard v. Glenn-Colusa Irr. Dist.*, 201 Cal. 726, 742, 258 Pac. 959, 966 (1927)). Presumably such a situation could result in invalidating either the section or its particular application. (For a description of actual assessment and water apportionment practices in irrigation districts see the dissent of Gibson, C.J., 47 Cal.2d 651-653, 306 P.2d 857-858, AJS 69-72).

Elsewhere the appellees argue that the acreage limitation is bad because it has "no relation whatsoever to the needs of the land" (Appellees' Br. 41). But, they argue inconsistently that an inapplicable statute, which the California court says has the very effect the appellees purport to condemn, should be imposed on the Santa Barbara Agency. From this inconsistency alone, it can be concluded that the appellees' argument that section 22250 represents a general state policy is baseless.

In a final attempt to avoid the lack of a common state ground in the irrigation district and Santa Barbara cases, the appellees imply that it lies in Article I, sections 11 and 13, of the California Constitution; they refer to the California court's treatment of the Second Validating Act as so holding (Appellees' Br. 44-45). But, as we have herefofore pointed out, in stating that the validating act could not cure constitutional defects in the Ivanhoe contract, the Califor-

nia court was concerned with the conduct of the United States as a utility and the constitutionality of the federal 160-acre limitation as referred to in California Water Code section 23200 (pp. 23-25 herein). Both are federal questions.

Certainly, nothing above, and nothing cited by the appellees, supports the conclusion that section 22250 applies to the Santa Barbara Agency. Further, there is no showing that the *Santa Barbara* case depends on any other purported non-federal ground. Thus, no matter what conclusion is reached by this court on the irrigation district cases, the *Santa Barbara* case should be reversed.

II. FEDERAL LAW DOES NOT REQUIRE THE UNITED STATES TO VIOLATE FEDERAL LAW.

The appellees argue that section 8 of the Reclamation Act of 1902 prevents the United States from acquiring the sort of rights it needs to be able to conform to other requirements of the reclamation laws (Appellees' Br. 47-63). We have already argued our views on this as a matter of interpretation (Appellants' Op. Br. 24-25, 57-60).

The appellees, however, accuse us of a "studied disregard" (Appellees' Br. 60) of the congery of citations which they offer. The accusation is correct. We have disregarded the cases because we believe they are irrelevant. We believe they are irrelevant because they have to do only with the types of systems the states may use to define property rights in water.

None of them say or imply that through the ostensible definition of property rights in water, a state may compel the United States to use federal facilities to deliver water in a manner contrary to federal law. For example, in *Kansas v. Colorado*, 206 U.S. 46 (1907), so heavily relied on by the appellees (Appellees' Br. 56, 65-66), what the court rejected was an attempt by the United States to impose on the State of Kansas against its will a different system of water rights (appropriative in lieu of riparian) (206 U.S. 86-87, 94-95). No issue was involved as to the distribution of water made available by a federal project.

A. The acquisition of water rights must be distinguished from the operation of projects.

In *Nebraska v. Wyoming*, 325 U.S. 589, 611-615 (1945), this court held that when the United States engages in reclamation development under section 8, it may not rely upon water rights alleged to arise from its ownership of the public domain, but instead must secure water rights for its project under the system established by state law. Immediately following this holding, however, this court cautioned that, "We do not suggest that where Congress has provided a system of regulation for federal projects, it must give way before an inconsistent state system" (325 U.S. at 615).

This is the very distinction we assert here.[6] By virtue of section 8, the United States must proceed

[6]We agree with the Solicitor General that, "As in *Nebraska v. Wyoming*, 325 U.S. 589, 611-616, it is unnecessary here to determine who has the title to unappropriated water" (U.S. Amicus

under state law to acquire the rights in unappropriated water which it needs for a reclamation project. The appellees concede that it is so proceeding in the instant cases (Appellees' Br. 52). If rights acquired in this manner are insufficient to permit operation of the project as provided and authorized by federal law, section 8 requires the United States to pay for the privately owned rights which are needed. This is the rule of *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 739 (1950). And this is what the United States will have to do here if operation of the project in accordance with the acreage limitation truly deprives any persons of vested property rights.[7]

The appellees agree with us that the California court construed section 8 as compelling the United States to give *specific* recognition to water rights established under state law (Appellants' Op. Br. 58-59), but argue that this construction is plainly correct (Appellees' Br. 60). But if it is, why was the United

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Curiae Br. 68). The reason is that the authority of the United States to make and perform the contracts in issue does not depend on the answer to that question. The comments of the Solicitor General on the question (U.S. Amicus Curiae Br. 67-69) are an incomplete statement of a problem that is particularly complex and vexatious in the western states, and erroneous inferences can be drawn from it. However, because of its irrelevancy, we do not feel it necessary to express our own views.

[7] We question whether the inchoate rights declared by the California court have sufficient substance to constitute property within the meaning of the Fifth Amendment of the United States Constitution. And even if they do, as we have elsewhere stated (Appellants' Op. Br. 61-63; p. 17 herein) we believe that the limitation is a restriction on the use of federal project facilities and that it does not in any way interfere with those inchoate rights. If we are correct, it is, of course, unnecessary for the United States to acquire them in order to apply the limitation.

States not required to give specific recognition to the water rights taken in the *Gerlach* case? And if it was permissible under section 8 for the United States to take, with compensation, the water rights of the Gerlach Live Stock Company because needed for the project, why would the taking, with compensation, of the inchoate rights of "excess" landowners, if needed for the project, be a violation of section 8 or constitute an overriding of state law?

B. Section 8 does not require that other federal laws be ignored.

That section 8 was intended to permit the imposition of the acreage limitation is not only demonstrated by common-sense canons of interpretation and by case authority, but also by the statements of the Congressional sponsors of the Reclamation Act of 1902.

Senator Newlands, the principal author, said:

> "So when we came to the national irrigation act we not only provided for the reclamation of government lands but we also realized that intermingling with the government lands and adjacent to them were large areas of land held in private ownership, and that the development of the country required that those lands should have water just as much as the lands in government ownership. What we wished to avoid was storing water and distributing it for the advantage of large land owners, and what did we provide? We provided in that act that wherever land was in private ownership the owner of the land could obtain water for only 160 acres.
>
> "The result is, that when the distributive system of water is brought in reach of a great area

of land the very fact that the water can be secured adds value to the land. The owner of the land finds that he cannot water the land himself, because he can only secure a water right for 160 acres. He is therefore induced by self-interest to divide up his land and sell it to actual settlers; and the Government in those instances will grant to each settler a water right for only 160 acres, and compel the gradual repayment of its cost. So the very policy of the Government, as shown in that act, is in the line of breaking up the *existing system of land monopoly and of land concentration in that region. . .*" (1 Darling, The Public Papers of Francis G. Newlands 92-93 (1937)).

"That region" included the San Joaquin and Sacramento Valleys of California where "large concentrations" of land were taking place (*id.* 91).

Moreover, the proviso of section 8 itself, requiring appurtenancy of water rights to land, actually appears to be a means of enforcing the limitation. One of the fears of the early students of the law of appropriation of waters in the west was that appropriation would permit the development of a water monopoly. John Wesley Powell, writing in 1879, said that under the appropriative system "water rights will in many cases be separated from land rights . . . monopolies of water will be secured." As a precaution he suggested:

> "The *user right* should attach to the *land* where used, not to the individual or company constructing the canals by which it is used. The right to water should inhere in the land where it is used;

> the priority of usage should secure the right" (Powell, Report on the Lands of the Arid Region 42-43 (2d ed. 1879)).

Similarly, in 1890 it was suggested in the Senate "that ownership of the water should be inalienable from the land, and that men could not sell or alienate the water right except by selling the land, and that when they did the man who had the land should have the water right" (Report of The Special Committee of the U.S. Senate on Irrigation Etc., v. 1, p. 404 (1890)).

This idea of inalienability of water from the land eventually found its way into section 8 of the Reclamation Act of 1902. For example, Congressman Mondell in discussing the original bill said:

> "In order that the water rights acquired under the provisions of the act shall be of the character most approved by centuries of irrigation practice, and such as will absolutely insure the user in his right and prevent the speculative use of water rights, the character of the right which is contemplated under the act is clearly defined to be that of appurtenance or inseparability from the lands irrigated and founded on and limited by beneficial use" (H. R. Rep. No. 1468, 57th Cong., 1st Sess. 6, 7 (1902)).

The requirement of appurtenancy as provided in section 8 exists whether required by state law or not. It appears as a proviso and hence an exception (*McAlpine v. Baumgartner*, 10 Cal.2d 409, 417-418, 74 P.2d 753, 757 (1937)) to the general rule that otherwise

state law will be followed. Furthermore, the legislative history is express and clear. Congressman Mondell, discussing the part of the bill which eventually became section 8, said in the House of Representatives:

> "These most important provisions of the law prevent all evils which come from recognizing a property right in water with power to sell and dispose of the same elsewhere and for other purposes than originally intended. *This is an advance over the water usages of most of the States,* and it is not denied that making water rights appurtenant to the tract irrigated will in some instances work a hardship, but it is believed that it is much better to risk the individual hardships which will inevitably occur under a provision of appurtenance than to risk the evils certain to result from unlimited authority to transfer water rights" (35 Cong. Rec. 6679 (1902)).

There is in California no statute making a water right perpetually inseverable from the land such as the Washington statute mentioned in *Ickes v. Fox,* 300 U.S. 82, 93-94 (1937). Thus even though under California law the place of use may be changed (Calif. Water Code § 1701), section 8 may forbid this in the case of project water. The connection between this and the enforcement of the acreage limitation is clear: Under the original Reclamation Act, when the United States sold "water rights" to individual water users (1) the water right could not be transferred by a nonexcess owner to an excess owner, and (2) those having water rights could not speculate with them apart from the land. Now that the pattern of contracting is be-

tween the United States and organizations of water users, the same objectives are met by the restriction on the delivery of water in the contracts with the organizations.

C. Even the broadest interpretation of section 8 does not support the judgments below.

The appellees argue that the United States "may secure the title permitted by state law, no more and no less" (Appellees' Br. 61). This is consistent with what the California court said:

> "Moreover, as we have already held, whatever title the United States has to the domestic waters of the state is limited by the trusteeship under which that title was acquired" (47 Cal.2d 642, 306 P.2d 851, AJS 56; see also 47 Cal.2d 628, 306 P.2d 842, AJS 35).

It should be noted that the trust is thus applied to a right acquired from private owners by purchase and eminent domain as well as to rights sought in unappropriated water applications filed by or with the state. It should also be noted that the trust compels the United States to make water deliveries through its projects even though forbidden by federal law.

The question, then, is whence came the trust imposed on all these categories of water rights. The California court said it comes from "the statutory law of this state", specifically California Water Code section 102:

> "The nature of the title to the waters here involved is further indicated by the statutory law

of this state. The title to these waters was mentioned at an early date in the amendment of section 1410 of the Civil Code in 1911 which provided that 'All water or the use of water within the State of California is the property of the people of the State of California' subject to appropriation and use in the manner prescribed by law. That provision in effect was carried into section 11 of the Water Commission Act of 1913 which provided that 'All waters flowing in any natural water course in the state excepting so far as such waters have been or are being applied to useful or beneficial purposes, upon, or in so far as such waters are or may be reasonably needed for useful, and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is and are hereby declared to be public waters of the State of California and subject to appropriation in accordance with the provisions of this act.' (Stats. 1913, p. 1018.) The same provision was carried into the Water Code in 1943 as section 102" (47 Cal.2d 623-624, 306 P.2d 839, AJS 27-28).

Using this statute as the basis for the trust is so contrary to the previous decisions of the California court that the inference that the "trust" is being used merely as a device to discriminate against the United States must reluctantly be drawn.

These purported rights were declared to exist in defiance of what has previously been declared to be the law of California:

> "It is at least equally true, however, that every inhabitant of a state or district does not possess a potential right inherent in his habitancy, to di-

vert so much of the waters of a stream as he may have occasion to employ" (*Lux v. Haggin*, 69 Cal. 255, 313, 10 Pac. 674, 705 (1886)).

This was never contradicted in the previous discussions of what is now California Water Code section 102:

> "The water that pertained to or was contained in the lands of the state was already the property of the people when this amendment was adopted. The statute was without effect on any other property" (*San Bernardino v. Riverside*, 186 Cal. 7, 30, 198 Pac. 784, 794 (1921)).

> "The true reason for the rule that there can be no property in the *corpus* of the water running in the stream is not that it is dedicated to the public, but because of the fact that so long as it continues to run there cannot be that possession of it which is essential to ownership . . . Such right to the water of running streams as there is under the law is vested entirely in the several riparian proprietors" (*Palmer v. Railroad Commission*, 167 Cal. 163, 168, 138 Pac. 997, 999 (1914)).

Statutes like California Water Code section 102 were adopted in many western states in an effort to prevent the United States and its grantees from claiming riparian rights. These provisions "are not considered as vesting the state with any property right in the waters on their use but as affirming sovereign jurisdiction over them" (Bannister, *Federal Disposition of State Waters*, 28 Harv. L. Rev. 270, 288 (1915)). "In recent years a notion has sprung up

that running water is *res publica*; that it is owned by the state in exactly the same way, for example, that the state house is owned. This idea had its origin in the attempts of western states to make constitutional provision for the adoption of the appropriation system where it was feared federal patents had fastened the system of riparian rights upon considerable areas. All that these assertions of state ownership ever really achieved was to assert a state sovereignty with respect to water resources of the state, which really needed no assertion" (Roscoe Pound, Book Review, 28 Harv. L. Rev. 824 (1915)). Thus, framing an argument or a holding in terms of title is simply a circumlocution.

Actually, the trust as defined by the California court cannot be supported even as to previously unappropriated water. The appellees state: "In referring to the 'inchoate rights of present and potential water users of the state' (e.g. AJS 32), deriving from the applications filed by the State Director of Finance and the trust character of the waters, the Supreme Court of California was laying hold of no new or novel principle" (Appellees' Br. 33). This statement is so categorically wrong that it too supports the serious charge that it is an attempt to put forth a plainly untenable state ground merely to frustrate federal review (*Ward v. Love County*, 253 U.S. 17, 22-23 (1920)).

In *Palmer v. Railroad Commission*, 167 Cal. 163, 138 Pac. 997 (1914), the California Supreme Court was considering this very question whether the de-

scription, in a notice of appropriation of water by a public utility company, of places of intended use gave those owning land therein a right to demand water from the company:

> "The theory of the plaintiffs is that this designation of places of intended use constituted a dedication of the waters claimed in the notice to the public use for the benefit of all the territory embraced in the designated places . . . [and therefore] the persons owning lands within any of the places named have the right to demand a proportional share of such water for use upon such land" (*Palmer v. Railroad Commission*, 167 Cal. 163, 167, 138 Pac. 997, 998 (1914)).

On this the court held:

> ". . . the territory to which the water is dedicated is not necessarily the same as the places of intended use named in the notices" (*id.*, 167 Cal. at 174, 138 Pac. at 1001).

In ignoring this, the only state case in point, the California court has given further confirmation that the trust theory announced in the instant cases is a device contrived for this sole occasion.

The discriminatory nature of the trust appears also from the appellees' argument based on California Constitution, Article XIV, Section 3. They claim that this amendment prohibits the acreage limitation (Appellees' Br. 41).

The amendment seeks to encourage the beneficial use of waters "to the fullest extent of which they are capable." Appellees would twist the amendment to

mean that large uses are favored because they are a use of fuller extent than a small use. Not only would they eliminate the policy of the limitation, they would reverse it. But the sanction to achieve use of the "fullest extent" (apart from the curtailment of the remedies of riparians (p. 35 herein) is provided in the amendment itself:

> "the right to water . . . is and shall be limited to such water as is reasonably required for the beneficial use to be served. . . ."

It seems obvious by the appellees' argument that not only would the United States be denied the right to acquire water for its particular irrigation scheme, but that such denial would be discriminatory against the United States for that law never before has been used to say that one must irrigate a lot rather than a little (See *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204, 210 (1946)).

D. The California court's interpretation of section 8 would subject reclamation law to repeal by state action.

The California court has read section 8 of the Reclamation Act of 1902 as if it requires a complete subordination of the balance of the reclamation laws to what the state laws happen to be from time to time. Thus it says:

> "Also carried into the Public Lands Code of the United States is the provision of the Reclamation Act of 1902 [§ 8] that state laws remain unaffected by later enactments" (47 Cal.2d 639, 306 P.2d 849, AJS 50-51).

Assuming that such an interpretation of section 8 is not unconstitutional as an improper delegation of federal legislative power (cf. *United States v. Sharpnack*, 355 U.S. 286, 2 L. Ed. 2d 282, 287, n. 9 (1958); Note, *The Federal Assimilative Crimes Act*, 70 Harv. L. Rev. 685, 688-691 (1957)), it nevertheless would negate much of the reclamation law passed since 1902. Despite the holding of the California court, it is unreasonable to the point of being grotesque to hold that an earlier federal law, section 8, forbids the United States to do what a later law says it must do (Omnibus Adjustment Act of 1926, § 46).

The true meaning of section 8 is obvious in the light of its history. It means that the United States will not assert the riparian rights it might have otherwise claimed, to the destruction of the appropriative system prevailing in whole or in part throughout the west. A corollary of this is that it will pay for rights valid under state law which are taken for federal purposes (*United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 739 (1950)). But to say that the United States will adhere to the various appropriative systems existing under state law as a means of protecting the integrity of private property acquired under those systems, cannot be twisted into saying that the United States is disabled from acquiring by appropriation, purchase or eminent domain those rights which are required to operate federal projects in accordance with federal law.

III. CONGRESS HAS CONSTITUTIONAL POWER TO REQUIRE THE ACREAGE LIMITATION UNDER THE GENERAL WELFARE CLAUSE.

The appellees have sought to inject what they regard as a serious constitutional impediment to the interpretation that we urge of section 8 of the Reclamation Act as not forbidding the United States from applying the acreage limitation required by section 46 of the Omnibus Adjustment Act of 1926. They argue that Congress lacks the constitutional power to impose the limitation because the effect of the limitation is to "regulate, coerce and override state law" (Appellees' Br. 76). They contend that state law does not authorize an irrigation district to enter into the present contracts and does not permit the "unlimited title" to water needed by the United States to operate under the contracts. In effect, the appellees' position is that even if section 8 were not in the law, under the Constitution Congress could not impose the acreage limitation on the delivery of water from federal reclamation projects in California (Appellees' Br. 76).

This constitutional argument assumes that California law, of itself, forbids a district from contracting to receive water service from the United States subject to the acreage limitation. In our discussion of jurisdiction we pointed out that this assumption is not correct and that districts are authorized by state law to agree to the limitation if the United States can require it. The argument assumes also that the United States needs an "unlimited title" to water

rights in order to apply the limitation. If, as we contend, unlimited title really is not needed, because the limitation is a restriction on the use of federal project works and does not affect the property rights of "excess" landowners (see p. 39, n. 7 herein), this second assumption is also wrong.

The constitutional issue posed by the appellees is relevant only if "unlimited title" is necessary. The question, then, is: Can the United States, through exercise of the power of eminent domain, acquire the outstanding inchoate rights, which the California court held are possessed by the "excess" landowners, without exceeding the constitutional powers under which these reclamation projects have been built and are being operated?

The appellees answer this question in the negative on the grounds (1) that acquisition of such rights would "override" state law, and (2) that, acting under the general welfare clause of the Constitution, Congress is without authority to "override" state law. Both grounds are erroneous. As to the first ground, it has never been held that acquisition of property rights with payment of compensation constitutes the overriding of state law. To the contrary, the closest case in point, *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 739-740 (1950), which relates to the Central Valley Project, specifically upheld such action as constituting the respecting of state-recognized property rights which section 8 of the Reclamation Act demands. The appellees themselves acknowledged this when they stated with respect to the *Gerlach* case (Appellees' Br. 60):

"Because claimants' rights were protected under state law, *compensation* by the Federal Government was required for the damage done them."

As to the second ground, that state law may not be overridden when the United States acts under the general welfare power, the appellees again rely upon the holding in the *Gerlach* case. But the language they quoted (Appellees' Br. 64) destroys rather than supports their position:

". . . It was not until 1936 that this Court in United States v. Butler, 297 U.S. 1, declared for the first time, and without dissent on this point, that, in conferring power upon Congress to tax 'to pay the debts and provide for the common defense and general welfare of the United States,' the Constitution delegates a power separate and distinct from those later enumerated, and one not restricted by them, and that Congress has a substantive power to tax and appropriate for the general welfare, limited only by the requirement that it shall be exercised for the common benefit as distinguished from some mere local purpose. If any doubt of this power remained, it was laid to rest the following year in Helvering v. Davis, 301 U.S. 619, 640. Thus the power of Congress to promote the general welfare through large-scale projects for reclamation, irrigation, or other internal improvement, is now as clear and ample as its power to accomplish the same results indirectly through resort to strained interpretation of the power over navigation" (339 U.S. at 738).

Certainly, nothing in this indicates that the general welfare power is limited by the other powers delegated to the United States, and that it may not